INDEX

SUBJECT INDEX

Page

Petitioner's Reply Brief:

Ellis v. Union Pacific Railroad Company Decided by the Supreme Court of the United States February 3, 1947, not yet Officially Reported 1

Herein of Misconduct 4

Statement of the Case 14

Herein of Omissions and Misstatements 15

(1) Respondents' Brief, p. 7 15
(2) Respondents' Brief, p. 11 19
(3) Respondents' Brief, p. 13 20
(4) Respondents' Brief, p. 14 20
(5) Respondents' Brief, p. 14 21
(6) Respondents' Brief, p. 15 22
(7) Respondents' Brief, p. 18 23
(8) Respondents' Brief, p. 20 24
(9) Respondents' Brief, p. 25 25
(10) Respondents' Brief, p. 26 26
(11) Respondents' Brief, p. 26 26
(12) Respondents' Brief, p. 32 28

Inconsistencies and Conflicts in the Testimony are Properly Matters for the Jury 29

Authorities Relied on by Respondents do not Involve the Legal Aspects of "Safe Place to Work" and Hence Are not Applicable Here 35

Lights and Markers 39

CASES CITED

Baltimore & Ohio R. Co. v. Berry, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510 35

Bimberg v. Northern Pac. Ry. Co., 217 Minn. 187, 14 N. W. (2d) 410 (certiorari denied 323 U. S. 752, 89 L. Ed. 56, 65 S. Ct. 87) 40

Bly v. Southern Ry. Co., 183 Va. 162, 31 S. E. (2d) 564 40

Brady v. Southern Ry. Co., 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232 18

Cawman v. Pennsylvania-Reading Seashore Lines, 110 F. (2d) 832 (3 C.C.A. 1940, certiorari denied 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct. 24) 35

Davis v. Shirer, 288 F. 293 38

Davis v. Woolworth Co., 60 Fed. (2d) 344 31

Ellis v. Union Pacific R. R. Co., (decided U.S.S. Ct. Feb. 3, 1947); 15 Law Week 4188 ..... 1, 2

Fowler v. Pleasant Valley Coal Co., 16 Utah 348, 52 P. 594 2

Goodman v. Meyers, 50 Cal. App. (2d) 356, 122 Pac. (2d) 929 3

Harlow v. Laclair, 82 N. H. 506, 136 Atl, 128 3

Henwood v. Chaney, 156 Fed. (2d) 392 (Certiorari denied), 67 S. Ct. 113 3

Kenney v. Boston & Maine R., 92 N. H. 495, 33 A. 2d 577 3

Marinko v. Chicago, M. St. P. & P. Ry. Co., 63 S. D. 256, 257 N. W. 639 3

Matthews v. Atchison, T. & S. F. Ry. Co., 54 Cal. App. (2d) 549, 129 Pac. (2d) 435, 440 3

Miller v. Schimming, 129 Cal. App. 171, 18 Pac. (2d) 357 3

Missouri Pac. R. Co. v. Hathcock, 200 Ark. 294, 139 S. W. (2d) 35 3

Northern Pacific R. Co. v. Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296 3

Smarda v. Fruit Growers' Supply Co., 1 Cal. App. (2d) 265, 36 Pac. (2d) 701 ..... 31, 3

Smith v. Boston Elevated Ry. Co., 184 Fed. 387 3

Steele v. Kansas City So. Ry. Co., 265 Mo. 97, 175 S. W. 177 3

Sullivan v. Beneficial Life Insurance Co., 91 Utah 405, 64 P. (2d) 351 (1937) 2

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 Ct. 409, 88 L. Ed. 520 3

Texas & P. R. Co. v. Behymer, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905 3

Yazoo & M. V. R. Co. v. Sudduth, 171 Miss. 619, 157 So. 527 (1934) 2

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of The Denver and Rio Grande Western Railroad Company.

Respondents.

Petitioner's Reply Brief

Ellis v. Union Pacific Railroad Company Decided by the Supreme Court of the United States February 3, 1947, Not Yet Officially Reported

Petitioner respectfully submits that the decision of the Supreme Court of Utah in the case at bar is at variance and in conflict with the decision of this Court in the *Ellis* case supra and should be reversed. In reversing the judgment of the Supreme Court of Nebraska in the *Ellis* case

this Court considered the evidence to the effect that the place where Ellis was working when injured was deceptively dangerous because the overhang of the car on the curve and its tilt toward the building, resulting from a high outside rail, impaired and made insufficient clearance which was otherwise safe. In the case at bar the place where petitioner was working when injured was rendered deceptively dangerous by the darkness of the night, the black slag roadbed and the absence of foot walk, handrail, lights and markers. In the *Ellis* case the railroad company offered evidence which tended to prove that the clearance was impaired by the erection of a building over which it had no control; that neither the overhang of the car nor the pitch of the curve was unusual; that a sign was maintained near the building warning of impaired clearance and that petitioner could have performed his function equally well and in safety to himself on the opposite side of the engine. In the case at bar the railroad company contends that the judgment of the Utah Court should be affirmed on the strength of testimony to the effect that there was a platform between the tracks, that petitioner could have performed his function equally well and with safety to himself by dismounting on the north side of the train and that petioner did not look "*effectively*" before he stepped off the car. This Court in reversing the decision of the Nebraska Supreme Court in the *Ellis* case, made the following significant statement:

> "* * * it would not have been unreasonable for the triers of fact to have inferred that it was proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was

> insufficient warning to a man on the ground and that consequently petitioner was not furnished a safe place to work."

And in a foot note:

> "The duty of the carrier to furnish a safe place to work 'is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.' *Bailey v. Central Vermont R. Co.*, supra, page 353." (319 U. S. 350)

Under the evidence in the case at bar it was not unreasonable for the jury to infer that it was proper and usual procedure for petitioner to alight from the train on the south side. The flying fire had been observed on that side, and passing tracks, where passing trains could be expected, were but a few feet to the north. The jury could well infer from the evidence that the hazard of the bridge was not readily discoverable and that the bridge was therefore deceptively dangerous. While in the *Ellis* case the railroad company had taken the precaution of posting a warning of impaired clearance, the railroad company in this case had taken no precaution whatsoever to warn employees of the existence and dangers of the bridge. The mere fact that Pauly may have failed to exercise the highest degree of care for his own safety is not fatal to his cause. This Court in the *Ellis* case spoke as follows on that subject:

> "Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner. 45 U. S. C. Sec. 53."

In view of many of the statements made and attitude expressed by respondents in their brief, petitioner believes that he should make a reply, therefore, this brief.

All italics are added.

Herein Of Misconduct

On page 3 of respondents' brief is a statement of peculiar interest. It proceeds as follows: "The Supreme Court has shown a most tolerant and forbearing attitude toward petitioner in view of his flagrant misconduct in attempting to 'reconstruct' his evidence to his own advantage." Respondents have employed this argumentative charge throughout the whole course of this litigation. The evident purpose has been to create animosity against petitioner and his counsel. The matter of petitioner's alleged misconduct will be explored in the paragraphs to follow, but we pause to remark that his alleged "flagrant misconduct" in testifying responsive to "shockingly leading" and "suggestive" questions does not in any way prove that respondents furnished petitioner a safe place to work. The purpose of petitioner's action was to secure a determination, in proper judicial proceedings, of the question whether respondents failed in their duty to furnish petitioner a reasonably safe place to work, and if so, whether this failure contributed in whole or in part to the cause of his grievous and permanent injuries.

Respondents have pointed out certain conflicts between the testimony of petitioner as given in a deposition taken prior to trial and at the trial. It is true that in the deposition he testified that he checked the passing train from the rear, or east end, of the caboose, and at the trial testified that he checked the passing train from the front, or west

end, of the caboose. The impression is left that this testimony was given responsive to "shockingly leading questions." The following taken from petitioner's direct examination appears in the record commencing at page 89:

> Q. All right, go ahead.
>
> A. After I put on my hat and coat and grabbed up my lantern and yellow fusee, I stepped out of the west end door, and, as I did so, this, the engine on the passing track was just passing the west end of the caboose, and I checked the number on that engine, and immediately turned around to step down on the left, to go check that car.
>
> Q. Now, you saw this train pass you; and what train was it, by the way?
>
> A. No. 20.

In the course of the cross examination, which speaks for itself with reference to the fair, impartial and non-confusing attitude under which it was conducted, petitioner testified: (R. 106)

> Q. Then you have gone over this deposition recently, have you not, Mr. Pauly?
>
> A. Oh, yes.
>
> Q. When?
>
> A. Well, I went over it last night.
>
> Q. And in whose presence?
>
> A. No one's presence, my wife and I.
>
> Q. Have you gone over it, prior to last night, recently?
>
> A. Yes.
>
> Q. When?

A. I had the deposition in Grand Junction.

And at Record 115-116-117:

Q. Do you remember whether you went to the rear end of the caboose, after your caboose came to a stop?

A. No sir.

Q. You don't remember?

A. I didn't go to the rear end.

Q. You didn't go to the rear end?

A. No sir.

Q. Are you positive?

A. After my caboose was stopped?

Q. Yes.

A. No sir.

Q. Did you, just before your caboose was stopped?

A. I was on the rear end before my caboose was stopped, yes sir.

Q. And how long before your caboose was stopped were you on the rear end?

A. Coming over the east switch.

Q. Coming over the east switch?

A. That is correct, my hind brakeman and I were both on the rear platform coming over Chacra.

Q. How long did you stay?

A. Not very long.

* * * * * *

Q. You saw that headlight, then went in; is that the way you testify?

A. Yes sir.

Q. How far was the headlight away from you at the time you thus saw it?

A. Well, coming down the pass.

* * * * * * *

Q. Then how far back was it?

A. Thirty car-lengths away.

Q. Thirty car-lengths away?

A. Thirty, yes; you understand that isn't definite now.

Q. Now, I understand that, but that is your best judgment. Did you stay out on the back platform and check it as it went by?

A. No sir.

Q. That is one of your duties as trainman, isn't it, to check other trains that go by you, isn't it?

A. That's correct.

* * * * * * *

Q. Where did you fulfill your duty with respect to checking Train No. 20?

A. On the west platform.

Q. On the west platform; and not on the east platform?

A. That's correct.

Petitioner frankly admitted that in his deposition he testified that he checked the passing train while on the rear platform of the caboose.

On the basis of petitioner's affirmative answers to numerous "*Was* it true?" or "That *was* true, *wasn't* it" questions, respondents assert that the testimony given by petitioner at the trial was not only in conflict with that

given in the deposition, but with the direct examination as well. An examination of this cross examination, commencing at R. 117, will clearly reveal that petitioner was confused and that his confusion was taken advantage of by respondents' counsel. At R. 119 appears the following:

> Q. Do you remember testifying as follows:
>
> "Q. At that time you were on the head end of the caboose, were you?
>
> A. No.
>
> Q. At that time you were on the head end of the caboose, is that right?
>
> A. When I checked the train I was on the rear end."
>
> Q. Do you remember so testifying?
>
> A. Yes, sir.
>
> Q. Was it true?
>
> A. Yes. Also made—
>
> Q. Just answer the question, will you?
>
> A. It wasn't—
>
> Q. It wasn't true?
>
> A. That's correct.

Further revealing the attitude of petitioner is an answer made by him appearing at R. 122:

> "A. Well, I tell you they were true, I made a lot of statements, particularly to this accident at the time it happened, that wasn't on the mind, at the time the deposition was taken; that was the reason I went over with my wife last night, to get that in mind."

The Court recognized the confusion in which petitioner was placed by this strange and unusual cross examination

(R. 122). Nevertheless the examination continued (R. 123):

Q. Now, did you so testify at the time I took your deposition?

A. Did I testify to that?

Q. Yes; that I just read.

A. Yes.

Q. Was it true?

A. At that time, I have made a lot of the particulars, there is a lot of particulars I wanted to go over. I know I made a lot of statements in that deposition that are not true, as far as I can understand them to be, because the particulars of the case weren't in my mind.

Q. Didn't you think they were true at the time you gave your testimony?

A. At that particular time, yes.

It is apparent from the record, and was evidently apparent to respondents' counsel, that the witness was doing his very best to explain and justify the conflict, but nevertheless counsel persisted with his "*Was* it true" or "It *was* true, *wasn't* it" questions.

At Record 124 appears the following:

Q. Now did you so testify?

A. Yes, sir.

Q. Was it true?

A. There is a lot of particulars about it that come to my mind when I made that statement that are not true now.

Q. Something that was true then is not true now?

Q. Will you tell the jury something was true on August 1st, and it isn't true now?

A. No, sir; I mean—

Q. What do you mean?

A. I mean the particulars in my case weren't settled in my mind; I hadn't gone over anything at that time, at the time I came over for the deposition.

A. And last evening, when I took the deposition to study it over, there were a lot of particulars concerning my case that come back to my mind, a clearer view to some of the former statements I made might conflict with what I have said.

Counsel continued to badger this witness with "*Was* it *true*" questions.

The following is both typical and interesting (R. 125):

Q. You did so testify, didn't you?

A. Yes.

Q. Were they true, was that true that you testified to?

A. It was true except for—at that particular time that the deposition was taken, I thought they were true, yes.

And then follows:

Q. The question was whether you now thought that they were not true; your answers were not true?

A. No.

Q. You think they were not true?

A. They were not true now?

Q. Is that what you are saying?

A. No, I haven't said anything, I am trying to get clear in my mind what you mean and what I mean. I don't say that I lied, that isn't true what I said, no. No, what I want to do—

MR VAN COTT: I don't know whether the record is clear, your Honor. I can go back and read those two questions and answers, *but I think the witness is confused,* and I would rather do that than have any confusion.

We submit that in view of the cross examination respondents' counsel has exhibited considerable fortitude in charging petitioner "with flagrant misconduct." All of this cross examination occurred prior to petitioner's redirect examination, of which counsel so bitterly complains. See respondents' brief pages 3 and 4.

It will be remembered that both Ventura and petitioner testified that they were on the rear platform of the caboose at the time it crossed over the east switch at Chacra and that thereafter they entered the caboose for the purpose of making preparations to dismount. All the testimony is to the effect that petitioner was never on the rear platform at any time thereafter. Ventura's testimony supports the proposition that petitioner entered the caboose before passenger train No. 20 reached them. Commencing on page 39 of the record is the following testimony:

Q. Mr. Ventura, as this freight train was slowing down, as it pulled into Chacra, did you see Mr. Pauly in the caboose?

A. You mean in the caboose?

Q. Yes, as the train was slowing down before you dismounted?

A. Yes sir, Mr. Pauly put a new battery in his lantern, tried it out, and grabbed a fusee, a yellow fusee, I don't know whether ten minutes or five minutes—

Q. Where in the caboose was Mr. Pauly at that time?

A. He was at his desk, had his grip, and he got the battery out of his grip.

Q. Where was his grip, and where was he with respect to the east or west end of the caboose?

A. At the west end of the caboose, the desk is on the north side of the caboose.

Q. On the north side, to the west end?

A. To the west end.

It seems appropriate at this point in view of respondents' harsh attack upon petitioner, involving as it does his counsel, to make a statement which may or may not be of any interest to the Court. The author of this brief conducted the presentation of petitioner's testimony to the Court and jury. He was well aware of all of the statements made by petitioner in his deposition and naturally discussed the facts and circumstances surrounding the occurrence complained of with petitioner and his wife on several occasions prior to trial. The evening before petitioner was placed on the witness stand, he informed counsel that he had made a mistake in the testimony given in the deposition, that in the deposition he had stated that he checked passing train No. 20 from the rear end of the caboose when as matter of fact he checked it from the front end of the caboose. There never was any question in either the mind of petitioner or counsel as to what the testimony should be in view of this circumstance. For

petitioner to have repeated his former statement would have been nothing short of intentional falsehood. This is not the first instance where an honest man has made a statement which he thought at the time to be true and discovered later to be otherwise. Harry Pauly never intended to lie or to misstate the truth at any time in this case, and in the course of his deposition he stated what he then sincerely believed to be true. When he discovered and became convinced that several of the statements made in the deposition were not true, he confessed and admitted the conflict and attempted as best he could to explain why the misstatements had been made.

Counsel for respondents clutched this conflict to his bosom and though his great sense of justice was apparently outraged, he was wholly unable to transplant his fury into the minds of the jurors. They knew, as did the trial judge and all who participated in the trial, except counsel for respondents, that petitioner was honest, and that he did his best to state the truth even though he suffered embarrassment in so doing.

Petitioner's case was founded upon a charge that the bridge was within and a part of a work area and that as such it had not been constructed or maintained in a reasonably safe condition for its foreseeable use. Where or from what position Pauly checked the passing train could in nowise affect the condition of this bridge or its relationship to the work necessarily incident to the handling of respondents' trains in that locality. Petitioner, no doubt, would have stepped off the bridge where he did regardless of the point from which he checked the passing train. It is inconceivable that this fact contributed in any way to the culmination of events which led up to petitioner's

serious and permanent injuries. Counsel suggests that this so-called reconstruction of testimony was a deliberate attempt to fabricate and manufacture evidence, and suggests that "The Supreme Court of Utah might well have applied a much harsher expression than 'reconstruction' to this effort by Pauly (under questions from his counsel) to depart from the truth and change his evidence. That the Court did not take a more drastic view, with appropriate action, manifests a tolerance and forbearance to Pauly's case which entirely refute the vituperative remarks in Pauly's brief." (Resp. Br. 4). A threat of "harsh or drastic punishment," from whatever source it might have come would not have deterred petitioner from giving the exact testimony which he gave nor would such threat or possibility of harm or punishment have caused petitioner's counsel to advise a contrary course. If the jury had believed petitioner guilty of misrepresentation and of changing and manufacturing testimony to suit the needs of the occasion or that his counsel had advised it, the verdict would have been other than it was. We say to the Court, let the verdict determine what the trial court that heard the case and the jury which determined the issues of fact thought concerning petitioner's attitude, his appearance, his demeanor, his integrity, and his cause.

Statement Of The Case

Respondents state under the above heading at page 5 of their brief "Pauly had no work to do on or near the bridge itself." This argument is rather remarkable in view of the fact that it is admitted by all parties to this case that the first duty petitioner was required to perform at Chacra after the train stopped was to dismount from the

caboose. Certainly dismounting from a caboose is work. This is admitted by respondents on page 6, where they state: "It was Pauly's duty as soon as the train was stopped to dismount from the caboose and walk from 500 to 750 feet westerly to the car that was in trouble and eliminate the sticking brakes." The jury evidently believed that dismounting from the caboose was work and we believe that their findings on this point should be accepted.

HEREIN OF OMISSIONS AND MISSTATEMENTS

Respondents set forth twelve particular instances of alleged omissions and misstatements in petitioner's brief.

Petitioner will discuss these alleged omissions and misstatements under the numbers used by respondents in their brief (Pages 7 to 32):

(1) *Respondents' Brief*, p. 7.

Petitioner testified that he looked just before he stepped. On redirect examination, after the cross examination by the "Was it true?" method, petitioner testified (R. 142, 143):

> * * * went down the steps, glanced down. I did not make any examination with my light, glanced down; it looked black like it was the road bed, and then I just stepped right off.
>
> THE COURT: I would like to have one of you ask him when he says, 'I glanced down,' where does he mean?
>
> Q. Where did you mean when you said you glanced down?

A. Glanced down from my footing where I was stepping to, and it looked black.

THE COURT: Did you say 'for' my footing?

A. Yes, sir, where I was stepping off.

Q. It looked black to you at that time?

A. Absolutely right."

This was the last testimony given by petitioner on the subject.

The following is an example of what respondents claim is an admission of failure to look (R. 133, 134):

Q. Did you testify as follows:

A. No, it was all black to me as if I was on the main line is all on the side of the track.

Q. Did you so testify?

A. I so testified, but if it appeared all black to me as that statement says, I must have looked, didn't I?

Petitioner did not look with sufficient effectiveness to discover that the caboose was standing over the unguarded and unlighted bridge. He did look, however, and erroneously concluded that black slag roadbed was beneath him. His mistake is attributable to respondents failure to provide and install lights or markers or to equip the bridge with guardrail and platform.

Ventura's testimony is noteworthy:

Q. And before you stepped down from that caboose, you looked down, did you?

A. Yes, sir, for a second. (R. 52)

In alighting from cars railroad employees do not make a long and searching examination of the place upon which they are about to step (R. 95, 96, 143).

Ventura's "for a second" look led him to believe that black slag roadbed was below him. Petitioner's look led him to a similar conclusion. Ventura's conclusion was correct, petitioner's was not. Had petitioner's conclusion been correct he could have testified, as Ventura did, that he saw solid ground beneath him. Ventura's testimony that he saw the roadbed could only be based upon his own belief resulting from his "for a second" look and the fact that roadbed was actually beneath him when he stepped off.

Ventura, just as petitioner, did not see the bridge and did not know it was there (R. 54).

Under Alleged Misstatement (1) appears the following: "Petitioner's brief attempts throughout to give the impression that the petitioner looked *effectively* before dismounting from the caboose." Respondents evidently do not regard this statement as being a "misstatement." It is interesting to note that no citation from petitioner's brief is given in support of this charge. Petitioner has admitted from the outset that, unfortunately, he did not look *effectively* before he stepped down but that does not mean that he did not look at all. Petitioner testified time and time again that it looked all black to him as though he were stepping onto the shoulder. The record citations given by respondents do not support the contention that petitioner stepped down without looking at all. If the record is examined, it will be revealed that what petitioner said and what he testified to was that he looked down

and it looked all black to him and he just stepped off without making a careful examination. If the law were such as to require an injured employee seeking damages for injuries sustained by him as a result of falling into holes or depressions, or over ties, angle irons, rocks or clinkers, etc., when dismounting from engines or cars, to prove as a condition precedent to recovery that he looked "*effectively*" before he stepped off, then he could never recover. If he is required to look effectively he is required, at his peril, to discover the existence of the dangerous condition whatever it may be.

The opinion of this Court in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232, does not support the proposition for which it is cited at page 8 of respondents' brief.

At page 8 of their brief respondents state:

> "The evidence relied on by plaintiff on page 6 is at best extraordinarily weak because it does not justify any inference of looking *effectively* or even attempting to look *effectively.*"

There is no requirement known to petitioner, as revealed by the authorities, that a trainman must look *effectively* before dismounting from equipment, or that in the event of his failure to do so he is completely barred from recovery for injuries sustained by reason of the condition of the roadbed upon which he alights. The word "effectively" is defined as follows: "With effect;" "powerfully;" "completely;" "thoroughly." It is submitted that if petitioner had looked effectively he would have discovered the existence of the abyss below him regard-

less of its concealment and regardless of respondents' failure to exercise reasonable care in its construction and maintenance. A judicial requirement of effective examination before dismounting would repeal those provisions of the Federal Employers' Liability Act which eliminate contributory negligence as a defense in actions of this nature. Counsel has evidently been unable to find any authority which supports this view and we know of none. Petitioner's care or lack of care in dismounting from the caboose has no relevance whatsoever on the questions, "Was the bridge within a work area?" and "Was the bridge constructed and maintained for its safe foreseeable use?"

(2) *Respondents' Brief*, p. 11

Here again the use of the descriptive word *effectively* is misleading. There is nothing in the record which would preclude a finding that the darkness of the night, the darkness of the abyss and the black slag roadbed were deceptive to petitioner and could reasonably have led him into the false belief that the caboose was over the roadbed and not over the bridge. Respondents by their failure to furnish a platform, guardrail, lights or markers were responsible for the danger created by these deceptive circumstances.

Evidence that the caboose in the reflection of burning fusees and with lights inside was observable to people on the creekbed is not helpful nor is evidence regarding the distance at which a light could be seen. "How far that little candle throws his beam, etc."

(3) *Respondents' Brief,* p. 13

The testimony is clear that petitioner did not know the caboose was standing over the bridge. He looked and mistook the blackness of space for the black roadbed. To say that he knew the caboose was over the bridge when he stepped off into space is an accusation that petitioner attempted suicide. The evidence will not support this charge.

Respondents' statement that petitioner was familiar with the existence of the bridge and its condition harks back to the doctrine of assumption of risk, which would be a defense in this case if it had not been eliminated as such by congressional enactment.

(4) *Respondents' Brief,* p. 14

Petitioner has never denied the existence of the platform between the two tracks but has at all times contended that this was not a discharge of respondents' duty. See petitioner's brief pages 35-36-37-38. If the territory between the tracks was a place to work, then the whole of the bridge was a work place. Respondents could reasonably anticipate that trainmen would likely alight from the south side of trains standing on the main line track. By company rule trainmen were cautioned not to alight on the side adjacent to passing tracks, and in addition alighting on the south side is the natural thing to do when the evidence of sticking brakes (flying fire) is discovered and observed on that side of trains moving toward Chacra in the night time.

Respondents' contention concerning the platform between the rails is set at rest by the decision of this Court

in the case of *Ellis v. Union Pacific R. R. Co.*, supra. There the railroad contended that the employee "could equally well have performed his functions on the left, or safe, side of the engine." Plaintiff's evidence there indicated that persons performing the duties plaintiff was performing when injured frequently did so from the opposite, or right, side. The Court held that the jury might have concluded that the employee had a safe place to work but elected to choose a dangerous one and that any duty of warning was fully discharged by the presence of the sign calling attention to "impaired clearance," but on the other hand it could not be regarded as unreasonable for the triers of fact to infer that it was proper and usual procedure to work on the right side of the engine, "that the hazard was not readily apparent and was almost in the nature of a trap."

Another bit of evidence of importance in showing that the south side of the train was the proper or usual side from which to alight is the testimony of Ventura that when he looked for petitioner he looked along the south side of the train and not the north side (R. 53).

(5) *Respondents' Brief*, p. 14

Respondents state that it is not true that petitioner alighted from the south side for the reason that he had seen the fire on that side and dismounted there to fulfill his duty of inspecting and repairing the brake (R. 149). Respondents' statement is contrary to the record because that is just exactly what petitioner testified to (R. 91, 93).

When asked which was the proper side upon which to alight, he answered:

A. Well, naturally on the—naturally on the side where he had noticed the trouble.

Q. And why is that?

A. Well, you would assume that you would locate the trouble on that side, that would be greater. (R. 91)

According to all of the evidence and common sense as well he would more readily be able to locate the trouble on the side where he saw it. As he stated (R. 93):

> "My trouble was—naturally my trouble was on the left hand side. My mind was to get down on the left hand side to ascertain what that trouble was, as fast as I could, and in order to expedite the movement of my train, without further delay, and, naturally, my movement would be to turn to the left, and go down along that side of the train."

Petitioner has never contended that it was absolutely necessary for him to alight from the south side. He has claimed that under the circumstances he acted reasonably in so doing. He was deceived by the blackness of night and through respondents' negligence caused to mistake the blackness of space for the blackness of the slag roadbed (R. 53).

(6) *Respondents' Brief*, p. 15

Respondents persist in quoting from the deposition of Pauly and representing it to be testimony given at the trial. The error in this respect was called to their attention in petitioner's briefs supporting his Petition for Writ of Certiorari. Petitioner definitely testified on the trial of this case that at the time Train No. 20 passed he was on the west end of the caboose (R. 117), and that conflicting testimony given in his deposition was erroneous.

Q. Which part of that answer do you now say was untrue?

A. Oh, I stepped to the rear platform to check the train.

Q. You say that wasn't true.

A. That is right. (R. 126)

The Utah Supreme Court ended its discussion of this passing train incident as follows (R. 184):

"At least he could have waited a moment until it passed."

Petitioner testified on direct examination that he checked the passing train when he was on the west platform of the caboose (R. 89):

"A. After I put on my hat and coat and grabbed up my lantern and yellow fusee, I stepped out of the west end door, and, as I did so, this, the engine on the passing track was just passing the west end of the caboose, and I checked the number on that engine, and immediately turned around to step down on the left, to go check that car."

(7) *Respondents' Brief*, p. 18

Under the Safety Rule the safe course is the proper course to pursue and petitioner very definitely stated that under this rule the left, or south, side was the safe side to alight from (R. 90). If respondents did not agree with this testimony they should have introduced evidence to rebut it. Their failure to do so affords strong support for petitioner's contention that the left side of the train was the safe side from which to alight. A proposition supported by uncontradicted testimony cannot be overthrown by mere statements of counsel.

(8) *Respondents' Brief*, p. 20

The testimony clearly shows that the passing tracks at Chacra were commonly used as a place to stop trains and permit other trains to pass, it likewise demonstrates that it was common practice to use said tracks as a place where trains could be stopped when in need of inspection and repair (R. 43-44). We are at a loss to understand how a common practice could be more clearly proven than it was here by the testimony of the witness Ventura. He testified that during all of the time he had been employed by respondents it had been common practice to stop trains there for the purposes above enumerated. That the stopping of trains at Chacra for the purpose of inspection and repair was usual and customary, is indicated by the fact that all members of the train crew knew exactly what their duties required of them when the train was brought to a stop there. As soon as the train was stopped each train crew member undertook the immediate performance of his duties incident to the work of train inspection, protection, and repair, and in so doing subjected the territory between switches there to usage as a work place. Ventura alighted from the caboose on the south side and proceeded back to flag; Arvis, the head brakeman, alighted from the engine and proceeded toward the rear. Petitioner was engaged in dismounting from the train preparatory to proceeding to the point of difficulty when injured.

Linkins testified that when trouble developed in a train "it is customary to try to stop between the switches" (R. 68).

(9) *Respondents' Brief*, p. 25

The attempt of respondents' counsel to mislead the Court by misstating the evidence here reaches its height. Respondents' state that it is "gross exaggeration" to state that the crippled train was moved four or five or several miles and that petitioner decided that the train should proceed to Chacra. Counsel would convey the impression that the engineer knew nothing of the trouble or of the contemplated stop at Chacra until the train arrived at the east switch and that he then took it upon himself to stop the train and that petitioner had nothing to do with the making of the decision to stop the train at that point.

Funston is six miles east of Chacra (R. 142). Just as the train was leaving the west switch at Funston, the head brakeman informed the engineer that fire was flying from the south side of the train toward the rear. The engineer decided to try to kick the brake off by a good application and, if that failed, to "go over to Chacra between switches and stop" (R. 69,70). The engineer testified that this was customary procedure. (R. 68)

As the train was leaving Funston petitioner's attention was called to the flying fire, indicating a sticking brake (R. 86). Petitioner determined to put out the red fusee so that the train would be stopped at Chacra. He knew that the signal could not be seen before the train came around the curve into Chacra (R. 87-88). It is thus clear that petitioner determined, when the flying fire was first observed as the train was leaving Funston, to stop the train at Chacra for inspection and repair.

(10) *Respondents' Brief*, p. 26

Petitioner and other members of the train crew were required to dismount from the train before proceeding to the place where the repair work was to be done, and in doing this it was reasonable for petitioner to alight from the south side of the train. We are not concerned here with a situation where a trainman was required to dismount from a caboose at a time when it was east of the bridge and to then proceed westerly toward a point of difficulty. Hence this alleged misstatement or omission as applied to the facts in the case at bar has no relevance or significance whatsoever.

(11) *Respondents' Brief*, p. 26

A careful reading of petitioner's testimony commencing at R. 140, will demonstrate that he was asked whether he was familiar with the bridges over creeks, gullies or canyons within the various yards and between switch points at sidings and passing tracks in the division embracing Chacra, and that he answered affirmatively, that he was then asked if the bridges over such creeks and gullies at these places were equipped with footwalks and handrails and he stated that they were (R. 141). He then produced a list of bridges over creeks and gullies, etc., between switch points at stations, switch tracks, sidings and passing tracks within said division and proceeded to describe each of such bridges and stated that all of them except one were equipped with footwalks and guardrails on each side. The one exception, the bridge at Rifle, had a handrail and footwalk on the left side only.

Respondents state, on page 27 of their brief, that petitioner admitted that he had only counted the bridges that were equipped with footwalks and handrails, thereby seeking to create the impression that there were other bridges over gullies or creeks between switches which were not equipped with guardrails and footwalks. This is misleading. Petitioner definitely testified that he was describing all of the bridges between switch points within the division. It may be that other bridges between stations in this territory are not equipped with guardrails and footwalks, but from the evidence it is clear that all bridges between switches except at Chacra and Rifle were equipped with guardrails and footwalks on both sides. This conclusively appears from the following question which was addressed to Linkins and the responsive remark of respondents' counsel (R. 151):

> "Q. • • • • What have you noticed with reference to the condition of these bridges between switch points: that is, with respect to foot walks and guard rails?
>
> MR. VAN COTT: If the Court please, this is purely cumulative. I have no intention of producing any evidence to the contrary of what he testified."

Respondents also state that all of the bridges mentioned by petitioner were within three or four hundred feet of switch points. The record does not support this statement. The record shows that petitioner admitted that several of these bridges were within that distance of switch points. He did not testify or convey the impression that all of the bridges so mentioned were within that distance of switches (R. 145).

(12) *Respondents' Brief*, p. 32

Petitioner has never contended that there was anything but a general verdict returned in this case. While there were no special findings, reference should be made to Instruction No. 9 (R. 14):

> "• • • • that if you shall find from a preponderance of the evidence each of the following: (1) that the defendants could and should reasonably have anticipated that plaintiff or other members of its train crews in the performance of their duties would in the nighttime alight from one of their trains on the south side thereof while said train was upon the bridge at Chacra; and (2) that defendants failed to and did not keep and maintain the south side of said bridge in a reasonably safe condition in that said defendants did not keep and maintain on the south side of said bridge a foot walk, guard rail or light; and (3) that by reason of the failure of defendants to keep and maintain on the south side of said bridge a foot walk, guard rail or light, the defendants did not use reasonable care in providing its employees a safe place to work, then and in such an event, you may find that defendants were negligent, and if you shall find and believe from a preponderance of the evidence that defendants were thus negligent by their failure to keep the south side of said bridge in a reasonably safe condition for the use of their employees, as hereinabove set forth, and that such negligence proximately caused, in whole or in part, the injuries suffered by plaintiff then you should find for the plaintiff. • • • •"

It is submitted that the verdict based as it was on Instruction No. 9, demonstrates that the jury found according to petitioner's contentions.

Respondents' statement, on page 32 of their brief, that the general verdict indicates only that there was a

finding of some negligence is ridiculous. The plaintiff was required to particularize in his complaint the act of negligence relied upon by him and the jury was specifically told by the foregoing instruction the particulars of the act of negligence which it was required to find before it would be permitted to award damages to plaintiff. The jury was not permitted to base a verdict on any act of negligence it might imagine existed, it was limited, of necessity, by the instructions.

Inconsistencies And Conflicts In The Testimony Are Properly Matters For The Jury

Because of the conflict in petitioner's testimony at the trial and in his deposition, respondents now argue that the only testimony given by him on matters wherein there was a conflict which the Court may consider is that which most strongly weighs against him. In support of this argument they cite *Fowler v. Pleasant Valley Coal Co.*, 16 Utah 348, 52 P. 594. In that case the plaintiff repeatedly and definitely testified that he knew of the dangerous condition of the walls of the mine, he also testified that he relied solely upon the statement of the foreman that no dangerous condition existed. This testimony was all given at the trial.

A later case from the Utah Supreme Court reaches a somewhat contrary result and is in accord with petitioner's contention here.

In *Sullivan v. Beneficial Life Insurance Co.*, 91 Utah 405, 64 P. (2d) 351 (1937), plaintiff commenced on action to recover on an insurance policy. Defendant pleaded that the policy had lapsed for non-payment of premiums. Plaintiff contended that the defendant had by its conduct

waived the strict performance of the policy provision relating to premium payments. On cross examination plaintiff testified to certain facts which supported defendant's contention, but on redirect and recross examination she gave testimony in conflict with her testimony on cross examination and which furnished substantial support for her theory of waiver. The trial court granted defendant's motion for a directed verdict and upon appeal respondent made the same contention as do respondents here, but the Court after reviewing numerous authorities, held with plaintiff and reversed the judgment. Among other things, the Court stated:

> "But we are unable to accept that view. The Court is not justified in determining whether a directed verdict should be granted to determine the weight of plaintiff's evidence found in cross examination or elsewhere."

The Court reviewed the opinion in the *Fowler* case and held that it did not support the contention made by respondent, and stated:

> "It is clearly a case where the ruling of the Court is based on definite and repeated testimony of the plaintiff that he had full knowledge of all the dangers and thereby makes the statement that he relied upon the statement of the foreman wholly improbable and entirely unworthy of belief."

Quoting from Corpus Juris, the Court stated:

> "To determine whether the evidence makes an issue of fact, the whole of the evidence and not merely certain selected parts thereof is to be considered."

In speaking of the evidence upon which the contention was based, the Court stated:

> "An examination of the evidence under cross-examination upon which respondents rely for destroying the evidence given on direct examination is not of the character found in the Fowler case. It cannot be said that there are such positive and clear-cut contradictory statements in the cross-examination as to make the evidence given in the examination in chief wholly incredible. Under such conditions, the rule announced by Justice Straup in the Putnam case that all the evidence be considered, and portions thereof may not be selected or omitted for the purpose of basing a judgment. Such consideration can be given only by the trier of fact."

Respondents seek to apply to this case the rule announced in *Smith v. Boston Elevated Ry. Co.*, 184 Fed. 387 and *Davis v. Woolworth Co.*, 60 Fed. (2d) 344. Those cases involved a change of theory between the first trial and the second trial. In those cases there had been a reversal of judgments obtained in the first trials.

The strict rule announced in the cited cases does not apply where the former testimony is given on deposition prior to trial. *Miller v. Schimming*, 129 Cal. App. 171, 18 Pac. (2d) 357; *Smarda v. Fruit Growers' Supply Co.*, 1 Cal. App. (2d) 265, 36 Pac. (2d) 701; *Goodman v. Meyers*, 50 Cal. App. (2d) 356, 122 Pac. (2d) 929.

Concerning a situation where prior inconsistent statements were proved, it was stated in *Matthews v. Atchison, T. & S. F. Ry. Co.*, 54 Cal. App. (2d) 549, 129 Pac. (2d) 435, 440:

"This situation, no doubt, has led defendant to make here an insistent argument against the credibility of plaintiff's testimony in this and other respects; an argument which might properly have been, and no doubt was, addressed to the jury, but which cannot prevail on appeal. There is nothing impossible or even inherently improbable about plaintiff's testimony. Everything to which he testified could have happened without doing violence to any of the laws of nature or any invariable pattern of human behavior. He was contradicted by other witnesses in the vital parts of his testimony; but whether he or the others should be believed was a question for the jury, upon which we are bound by their decision. 'A conflict between the testimony of a witness and statements previously made by him presents a question to the jury or trier of facts, and it is not the province of the appellate tribunal, under ordinary circumstances, to interfere therewith.'"

It was stated in *Henwood v. Chaney,* 156 Fed. (2d) 392, (Certiorari denied) 67 S. Ct. 113, as follows:

"The appellant in its brief presents argument relating to inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision. *Tennant, Adm'x. v. Peoria & Pekin Union R. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520."

In Miller v. Schimming, supra, p. 359, the Court stated: "From the above recital, it is apparent that not only was plaintiff's testimony during the trial contradicted by his previous testimony given during the taking of his deposition, but also that his testimony on direct examination as to the location of his truck when he looked both to the east and west, and more particularly the distance to the west within which his vision was unobstructed, was contradicted by his later testimony on cross-examination. Nevertheless,

we are not prepared to say that his testimony, although clearly contradictory in the respects mentioned and conflicting in other respects, is entirely discredited and unworthy of consideration. It is not conclusive of this appeal that the record indicates that plaintiff's testimony during the trial was, in many respects, conflicting, and that it was contradicted by his testimony given on another occasion. The question of the credibility of witnesses is one that is to be determined solely by the triers of fact. *Farmer's Bank of Camarillo v. Goodrich* 90 Cal. App. 717, 266 P. 550 • • • •."

In *Smarda v. Fruit Growers' Supply Co.*, supra, the Court stated:

"Prior to the trial, the deposition of Andrew Smarda was taken, which differed in several material respects from the testimony given by him at the trial. The conclusions reached by us in our former opinion were based in a large measure upon the testimony given in the deposition, but we have come to the conclusion that testimony given upon the trial of the case is controlling on appeal and any discrepancy was for the jury to pass upon and for them to say where the truth lay."

There is no ironclad rule that a party may not change testimony once given where he honestly believes that his former testimony was untrue, such a rule would oftentimes bring the sanction of law to the aid of falsehood. This is recognized by decided cases.

In *Steele v. Kansas City So. Ry. Co.*, 265 Mo. 97, 175 S. W. 177, the Court stated:

"When a party litigant takes the stand as a witness for himself he ought to be permitted, and he is per-

> mitted, to protect himself from the human frailties of forgetfulness and mistake precisely as is any other witness. He ought not to be, and he is not, bound down by any cast-iron rule that he is forever concluded by any the least lapse of memory or oversight or mistake which may lead him by inadvertence to a misstatement of fact, which may as a matter of law destroy his case utterly. He may correct his errors and mistakes and lapses of memory and leave the jury, on the whole case, to pass upon his credibility."

In *Harlow v. Laclair,* 82 N. H. 506, 136 Atl. 128, the Court stated:

> "In other words, the law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony, whatever may be its source."

The Court also stated:

> "If a party's testimony consists only of a narrative of events in which he participated or which he observed, there is an obvious possibility that he may be mistaken like any other witness."

Any conflicts between the testimony of petitioner at the trial and in his deposition could involve at most a question of credibility for the jury. This Honorable Court has very definitely stated that weight of evidence and credibility of witnesses are questions exclusively for the jury. *Tennant v. Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Authorities Relied On By Respondents Do Not Involve The Legal Aspects Of "Safe Place To Work" and Are Not Applicable Here

Respondents contend that *Baltimore & Ohio R. Co. v. Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510 is controlling here and state on page 52 of their brief that petitioner seems to concede the applicability of the *Sudduth, Hathcock, Marinko* and *Shirer* cases by making no effort to distinguish them.

Respondents contend that the negligence relied upon by plaintiff in the *Berry* case and upon which the case was submitted to the jury was the unsafe condition of the trestle. Surely respondents cannot be sincere in this contention. It is clear from reading the opinions of the Supreme Court of Missouri and the United States Supreme Court that plaintiff did not rely upon the failure of defendant to furnish decedent a safe place to work. He relied upon the negligence of the engineer in stopping the train when the caboose was on the trestle and the negligence of the conductor in directing or permitting deceased to alight from the caboose while it was so situated. It is to be noted that in the *Berry* case the train was not stopped between the switches of the passing track but was stopped on the main line to permit the lining of the switch so it could enter the passing track.

Petitioner here in "full bodied terms" relies upon a failure of material, the failure to furnish a reasonably safe place to work and not upon the negligence of any fellow employee. The distinction between the *Berry* case and the case at bar is demonstrated in *Cawman v. Pennsylvania-Reading Seashore Lines*, 110 F. 2d 832 (3 C.C.A. 1940, certiorari denied 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct.

24). Because of this distinction the Utah Supreme Court refused to base its opinion upon the *Berry* case (R. 179). In the opinion in the case of *Kenney v. Boston & Maine R.*, 92 N. H. 495, 33 A. 2d. 577, the *Berry* case is cited but only in connection with the Court's consideration of the alleged negligence of fellow employees.

The *Berry* case is not cited, discussed, mentioned or relied upon in connection with the Court's discussion of the alleged failure to furnish a safe place to work.

The *Kenney* case, supra, is clearly distinguishable from the case at bar. No one could explain why the train was stopped over the bridge, there was apparently no reason for the stop and the business at hand did not require it. Neither could anyone assign any reason for the deceased alighting from the car. In the case at bar the stop was necessary in order to repair the brake and it was necessary for petitioner to dismount in order to make the necessary repairs. As a matter of fact the *Kenney* case supports the position of petitioner here. The court there declared that if the railroad could reasonably anticipate that an employee in the course of his duties would have occasion to alight from the train when it was upon the bridge, then the railroad would be required to keep the bridge in a reasonably safe condition.

In *Yazoo & M. V. R. Co. v. Sudduth*, 171 Miss. 619, 157 So. 527 (1934), relied upon by respondents, the court did not consider the failure of defendant to furnish a safe place to work for the very good reason that plaintiff placed no reliance on such failure. The Court stated:

> "The ground of recovery relied on by appellee is this: That when the engineer received the rear sig-

nal, he should have assumed that Sudduth might not know that the engine was on the bridge, and, therefore, it was his duty to instruct him not to get off on the right-hand side where there was no walkway but on the left-hand side where there was one. Did the failure of the engineer so to do, under the surrounding facts and circumstances as stated, constitute negligence—or rather, did it make an issue of negligence for the jury?"

The Court answered this in the negative and based its decision on the *Berry* case.

In *Missouri Pac. R. Co. v. Hathcock,* 200 Ark. 294, 139 S. W. 2d. 35, plaintiff's contention was quoted from his brief as follows:

> "The one allegation of negligence relied upon is that the conductor, Guy Maris, when the train stopped at Newport, sent appellee back down the track to flag any train that might approach, and carelessly and negligently failed to warn him of the presence and the condition of a trestle over which he would be compelled to pass in performing his duty and the danger incident to such passage."

The Court then stated:

> "Counsel have correctly stated that liability of the railroad company is predicated upon the act of the conductor in sending appellee down the track without warning him 'of the presence and the condition of a trestle over which he would be compelled to pass'."

In *Marinko v. Chicago, M. St. P. & P. Ry. Co.,* 63 S. D. 256, 257 N. W. 639, it could not be determined with clarity whether plaintiff contended that he was a passenger or an employee at the time he was injured. In any event the case is distinguishable from the case at bar on the grounds

(1) there was no evidence that employees had ever used the bridge or the territory adjacent thereto as a work place, (2) it was not shown that the bridge was a place where it could be anticipated that any work would be done and (3) the plaintiff did not alight in the performance of any duty relating to his employment. Plaintiff was a bridge carpenter and was being transported to a place where a bridge was to be repaired. The train stalled on an ascending grade and it was decided to move the train to the next station in two sections. The section on which plaintiff was riding was the second. It was left standing on the track while the other section was being moved. The car in which plaintiff was riding was on a bridge. He alighted for the purpose of answering a call of nature and was injured.

In *Davis v. Shirer,* 288 F. 293, the stopping of the train upon which deceased was working was required by an engine going dead in a preceding train. Defendant's rule required the flagman to dismount from trains stopped at unusual places and go back with danger signals three quarters of a mile to warn approaching trains. The deceased was the flagman charged with this duty but he went back only 400 feet where he placed torpedoes on the track. He then started back towards his train which was then moving slowly. At the time he attempted to board his train it was on a trestle. There was an unusual jerk and he was thereby caused to lose his hold and fall to the creek below, where he was drowned. Plaintiff relied on the unusual jerk and the unsafe condition of the trestle as negligence. There was no evidence that trains had ever stopped on this trestle or that it could be reasonably anticipated that a train would stop there. The Court laid great stress upon the fact that the deceased should have been

elsewhere and was not in the performance of his duties but was acting in direct violation of the rule of the company at the time he was fatally injured.

In the case at bar petitioner was engaged in the performance of his duties when injured and there was substantial evidence that trains customarily stopped at Chacra for the purpose of passing, inspection and repair.

There was a strong dissenting opinion in the *Davis* case written by Circuit Judge Waddill. The dissent approaches the solution of the problems presented in this type of case in a manner similar to that found in the more recent cases from the United States Supreme Court. The *Davis* case was decided in 1923.

It is respectfully submitted that none of the foregoing authorities aid or support respondents' contention here.

Lights And Markers

Respondents assert at page 54 of their brief that the record is void of evidence that the absence of lights or markers on the bridge constituted negligence. They argue that the absence of lights or markers can not be regarded as negligence because neither respondents nor other railroads use lights or markers on such bridges. The fallacy of this argument is pointed out by Mr. Justice Holmes in *Texas & P. R. Co. v. Behymer,* 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905:

> "What is usually done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

This Court stated in *Northern Pacific R. Co. v. Mares,* 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296:

> "• • • • ordinary care • • • • is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless."

In *Bly v. Southern Ry. Co.*, 183 Va. 162, 31 S. E. (2d) 564, testimony was introduced that there was no custom or usage among railroad companies to place walkways or lights on bridges.

Following the foregoing United States Supreme Court decisions the Court held that this was not conclusive evidence of the exercise of due care, that the standard should be imposed by law and not usage or custom. See to the same effect *Bimberg v. Northern Pac. Ry. Co.*, 217 Minn. 187, 14 N. W. (2d) 410 (certiorari denied 323 U. S. 752, 89 L. Ed. 602, 65 S. Ct. 87).

Lights and markers would, no doubt, have called petitioner's attention to the presence of the bridge and the existing danger. This, at least, would have been a step in the direction of safety. Respondents contend that petitioner places no stress upon the lack of lights or markers. The failure to make the bridge safe and/or give warning of its presence is part and parcel of petitioner's charge as shown by the allegations in the complaint.

Respectfully submitted,

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